Office-Supreme Court, U.S.
FILED
AUG 7 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 227

FEDERAL POWER COMMISSION, *Petitioner*

v.

PAN AMERICAN PETROLEUM CORPORATION, *et al.*

No. 415

LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*

v.

PAN AMERICAN PETROLEUM CORPORATION, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PAN AMERICAN PETROLEUM CORPORATION, E. COCKRELL, JR., FREEPORT SULPHUR COMPANY, U.S. OIL OF LOUISIANA, INC., AND GENERAL AMERICAN OIL COMPANY OF TEXAS

CECIL N. COOK
NEAL POWERS, JR.
1100 Esperson Building
Houston, Texas 77002

Attorneys for E. Cockrell, Jr., Freeport Sulphur Company and U.S. Oil of Louisiana Inc.

W. P. BARNES
JERE G. HAYES
Meadows Building
Dallas, Texas 75206

CECIL E. MUNN
H. CARTER BURDETTE
1800 First National Building
Fort Worth, Texas 76102

Attorneys for General American Oil Company of Texas

J. P. HAMMOND
HAROLD H. YOUNG, JR.
P. O. Box 591
Tulsa, Oklahoma 74102

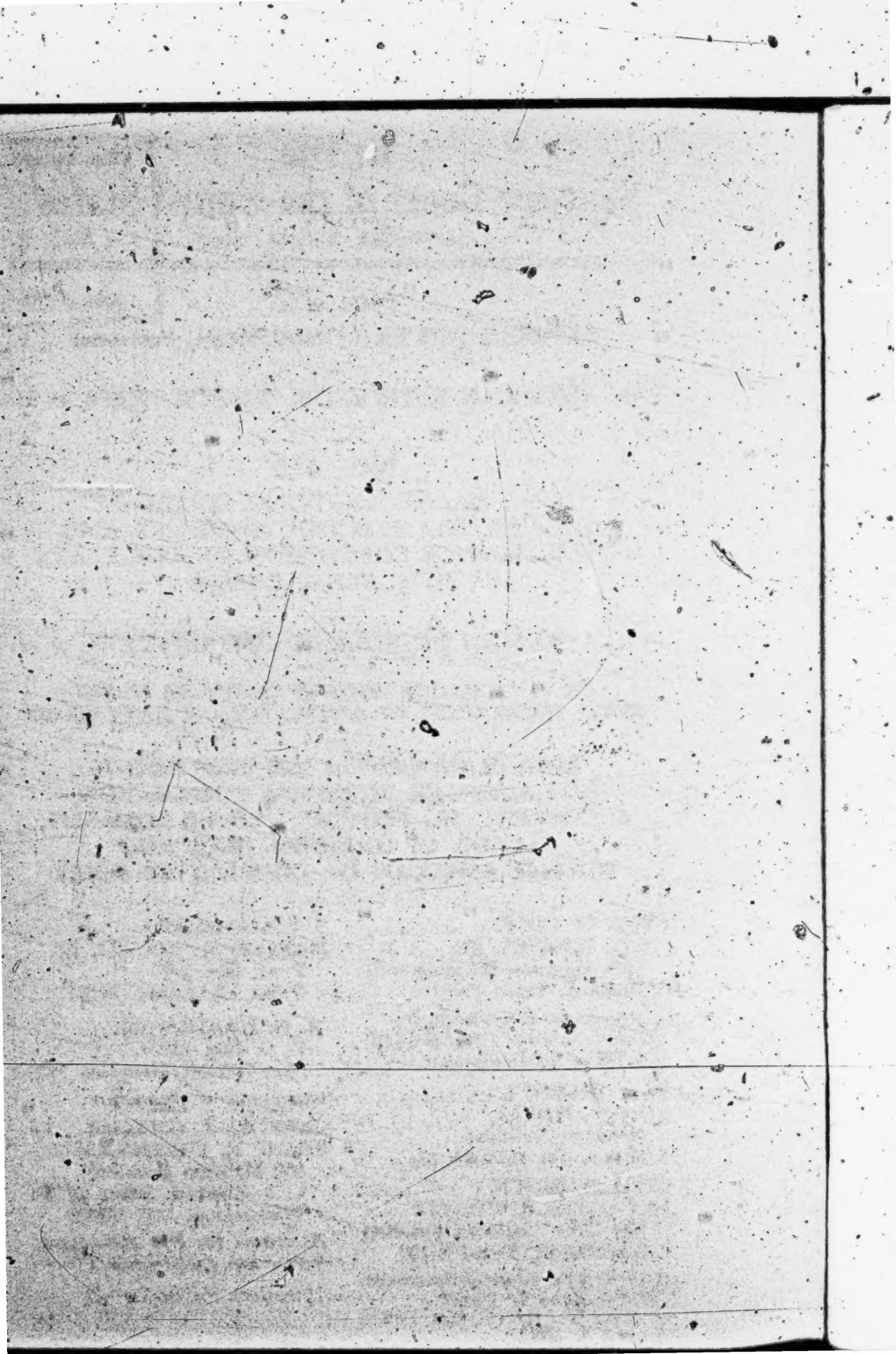
W. P. HARDEMAN
P. O. Box 50879
New Orleans, Louisiana 70150

WILLIAM J. GROVE
CARROLL L. GILLIAM
PHILIP R. EHRENKRANZ
600 Madison Building
1155 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorneys for Pan American Petroleum Corporation

August 4, 1967

WAYNE R. SCOTT CO. — LAW BRIEF PRINTING — 507 S. QUAKER, LUther 7-2052 — TULSA, OKLA.



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OPINIONS BELOW

The opinion of the Court of Appeals and its *per curiam* opinion on rehearing are reported at 376 F. 2d 161 and at 376 F. 2d 173; these opinion are reprinted as Appendices A and B, respectively, to the Petition filed by the Solicitor General on behalf of the Federal Power Commission (Commission) in No. 227, October Term, 1967. The opinion and order of the Commission is reported at 32 FPC 254 (J. A. 337-392), and its opinion and order on rehearing at 32 FPC 1358 (J. A. 456-467).

JURISDICTION

The jurisdictional grounds are adequately set out in the Petitions for Writ of Certiorari.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, June 21, 1938, C. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, are set forth in Appendix B, *infra*.

QUESTIONS PRESENTED

1. May the Federal Power Commission lawfully order the refund of sums collected under a temporary certificate of public convenience and necessity issued earlier by the same agency, but without any refund condition or other notice of contingent refund liability?

2. A motion was filed with the Federal Power Commission to impose refund conditions on "no refund condition" temporary certificates of public convenience and necessity. The Commission denied this motion and held that receipts under the temporary certificates were firm and not subject to refund. May the Commission now order the refund of such receipts in contravention of its earlier holding?

STATEMENT

Respondents filed separate applications for permanent certificates of public convenience and necessity pursuant to Section

7 of the Natural Gas Act, 15 U.S.C. 717f. These applications proposed sales of natural gas produced in Southern Louisiana or in the adjacent Federal offshore area to various interstate pipeline companies pursuant to individual contracts.

Pending action upon the applications for permanent certificates, the Commission granted, by separate orders, temporary certificates of public convenience and necessity to each Respondent authorizing it to make each of the proposed sales at or below the initial contract price proposed. The temporary certificates were issued by the Commission without any refund condition or other notice of contingent refund liability[1] (see, *e.g.*, J. A. 124).

Except in an instance where temporary certificates were *upheld* on appeal to the District of Columbia Court of Appeals,[2] no judicial review was instituted of the separate temporary certificate orders[3] issued without notice of refund liability.

In reliance upon the temporary certificates issued them,

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[1] Certain temporary certificates not placed in issue by the Petitions for Certiorari specifically stated that amounts collected thereunder would be subject to possible refund (see, *e.g.*, J.A. 165). These latter "refund condition" temporaries should be distinguished from the "no refund condition" temporaries presently before the court.

[2] *Public Service Commission v. Federal Power Commission*, 327 F. 2d 893 (CADC, 1964). The general power of the Commission to issue temporary certificates to producers was sustained by the court. There was no contention made in this case, however, that refund conditions should be inserted in the specific temporary certificates before the court.

[3] Temporary certificate orders are final orders which must be judicially reviewed, if at all, within the time specified in Section 19(b) of the Natural Gas Act. *Texaco Inc. v. Federal Power Commission*, cited *infra*.

Repsondents commenced deliveries or natural gas in interstate commerce.[4]

Thereafter, Public Service Electric and Gas Company, Long Island Lighting Company (a Petitioner herein) and United Gas Improvement Company filed a joint motion to impose refund conditions on temporary certificates granted Respondents without refund condition.[5] The Commission denied the motion, holding that receipts under the temporary certificates were firm and not subject to refund obligation.[6]

Judicial review was not sought of the order denying the imposition of refund conditions upon the temporary certificates.

After consolidation of the separate applications for permanent certificates, a hearing was had upon these applications and, following the tentative opinion of the hearing examiner, the Commission issued permanent certificates of public convenience and necessity to Respondents (J. A. 337).

In connection with the issuance of permanent certificates, the Commission held *inter alia* that it posses the power to order

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[4] Once having commenced deliveries in interstate commerce, the producer may not cease deliveries of gas without the permission of the Commission. Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b). See Note 10 herein.

[5] At issue were temporary certificates granted to producers to authorize sales of natural gas to Transcontinental Gas Pipe Line Corporation. Among the temporary certificates involved were temporary certificates issued to Respondents Pan American Petroleum Corporation (Docket No. G-16946), U.S. Oil of Louisiana Inc. (Docket No. C161-144), and General American Oil Company of Texas (Docket No. C161-182).

[6] This order of the Commission appears at 29 FPC 223 and is set out as Appendix A to this brief, *infra*.

the refund of sums collected under temporary certificates without refund conditions (J. A. 363-364). However, the Commission temporarily deferred the exercise of this claimed power, which it would assert as a "condition" to the permanent certificates therewith issued (J. A. 378).

The Court of Appeals reversed the Commission on the issue of refunds, and held that the Commission may not lawfully order the refund of sums collected under temporary certificates issued without notice of refund obligation (FPC Pet., App. A, pp-24-28). The Court cited with approval its decision in *Sunray DX Oil Co. v. Federal Power Commission*, 370 F. 2d 181 (CA 10, 1966), and repeated that the Commission may order refunds under Section 7 of the Natural Gas Act "only when a producer contractually agrees to make such refunds by the acceptance of a temporary certificate containing an express refund condition" (FPC Pet., App. A, pp. 25-26).

The Petition for Writ filed on behalf of the Commission herein raises solely the issue of "retroactive refunds" (FPC Pet., p. 3), and indicates that the reasons for review are the same as those set forth in the Petition filed in Sunray DX Oil Co., *supra*,[7] to which the Commission refers the Court (FPC Pet., p. 6).

Likewise, the Petition for Writ filed by Long Island Lighting Company, et al., raises but this one issue and makes reference to its Petition filed in Case No. 62, October Term, 1967.

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[7] Case No. 60, October Term, 1967. References herein to the Petition for Writ filed on behalf of the Commission in *Sunray DX Oil Co., supra*, take the form "FPC Pet., No. 60, p.___."

REASONS FOR DENYING THE WRIT

The broad argument of the Commission seeks to impress upon the Court that the decision below is administratively infeasible, an unsupportable "limitation upon the discretion of the Commission" (FPC Pet., No. 60, p. 13). Essentially, Petitioner urges that the Commission must not be foreclosed from ordering retroactive refunds simply because of the lack of forewarning to the affected producers of their refund liability; the decision below, it is suggested, is too "inflexible" in enunciating a rule which requires unequivocal forewarning before collections may be treated as subject to refund. For reasons, the Commission urges review of the decision below on alleged grounds that (1) it is clearly wrong and inconsistent with principles expressed in earlier decisions of this Court; and (2) it presents a question of substantial importance and one respecting which the Circuits are in disagreement. Respondents, on the other hand, will show the Court that the broad assertions regarding both error and importance are wanting in merit, and that the Petitions should be denied for failure to demonstrate sufficient cause for granting review of the decision below.

1. *The Decision of the Court of Appeals is Clearly Correct And is Wholly Consistent with Opinions of this Court.*

A. The Commission itself considered, and rejected, the imposition of refund conditions on two separate occasions. It detemined in the first instance to issue temporary certificates without

any refund condition,[8] and, after it did in fact issue temporary certificate orders, these "no refund condition" temporary certificates were neither challenged nor modified by judicial review.[9] The producers relied upon the temporary certificates granted them, and committed their gas to interstate service. These temporary certificates may not now be retroactively rewritten by the device of imposing a "condition" on the permanent certificates, for such belated action would constitute entrapment and thereby eliminate the fundamental initial choice of the applicant to use or to sell his gas in another manner if the refund or other requirements of interstate regulation are deemed onerous.[10]

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[8] Temporary certificates, both of the "refund condition" and "no refund condition" types, as well as permanent certificates [see Ordering Paragraph (J); J.A. 307-308], contain language providing that the mere fact of issuance is without prejudice to future Commission action (*Cf.*, FPC Pet., p. 4). The evident purpose of such general, routine language is to signal that the Commission will not necessarily issue identical authority in the future, on a *prospective* basis, after hearing. The reason for such routine language thus has nothing to do with refunds or claimed refund obligations. See *Sunray DX Oil Co., supra*, 370 F. 2d at 193-194.

[9] In one instance, temporary certificates were *upheld*, as issued, on judicial review (see Note 2, *supra*).

[10] After deliveries of gas commence in interstate commerce, the producer is not free to use or to sell his gas production in other fashion. This result stems from Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), which requires a hearing and "permission and approval" of the Commission before abandonment of jurisdictional service may be had. Except for the independent ground of depletion of gas supply, an inescapable natural phenomenon, abandonment of jurisdictional service may be had under the Natural Gas Act only if "the present or future public convenience or necessity permit such abandonment," *Ibid.* The standard just cited may be met by the producer only with difficulty, if at all, after protracted hearings. *Cf.*, Pan American Petroleum Corporation, *et. al.*, Docket No. G-18704, *et al.*, Order Adopting Examiner's Decision, 25 FPC 1 (1961). As a practical matter, once deliveries of gas in interstate commerce are initiated, the gas involved will flow to the same destination until depletion occurs.

The principle of "free choice" was stated in *Sunray Mid-Continent Oil Company v. Federal Power Commission*, 270 F. 2d 404 (CA 10, 1959), and was fully recognized and confirmed in the decision below. The Tenth Circuit, in *Sunray Mid-Continent Oil Company, supra*, held that the producer-applicant under Section 7 of the Act "has the free choice to accept or reject" a temporary certificate tendered by the Commission, and that he has the right:

> "... to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: 'Sell you gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by bond'." (270 F. 2d at 409).

Accordingly, the Court, in *Sunray Mid-Continent Oil Company, supra*, ruled that the Commission was required to take action upon requests for temporary certificates "with such certainty as to allow the exercise of choice."

Here, the Commission would eliminate the choice which existed before the commitments to interstate commerce were made, by modifying, retroactively, the terms of the temporary certificates upon which the "choice" was made. Here, the Commission would now tell the producer that he cannot retain the collection which he (and all concerned) conceived were his by virtue of the "choice" he made. That the refund conditions here sought to be imposed by the Commission physically reside in permanent certificates cannot obscure their real meaning and

effect — these conditions undeniably relate to deliveries of gas occurring under temporary certificates, and these conditions, then, in every real sense *are* conditions on the temporary certificates.

Sunray Mid-Continent Oil Company, supra, which forbids the corruption of unfettered judgment in the matter of entering the regulated market, is eminently sound in principle and reason and unerringly points to the correctness of the decision below. The Petitions filed herein should thus be denied.

Moreover, entirely independent of the doctrine of "free choice," the decision below is clearly correct because the "no refund condition" temporary certificate orders of Respondents were not challenged on this ground within the time permitted for judicial review by Section 19(b) of the Natural Gas Act (*Cf.,* Note 2, *supra*). After the expiration of the statutory appeal period, these temporary certificates without refund condition may not be collaterally attacked or modified by the Commission in any manner, certainly not through the use of an *ex post facto* "condition" relating to sums collected under the temporary certificates. *Texaco Inc. v. Federal Power Commission,* 290 F. 2d 149, 156-157 (CA 5, 1961); *Pan American Petroleum Corporation v. Federal Power Commission,* 322 F. 2d 999, 1004 (CADC, 1963). The Petitions may thus be denied on independent, but equally sound, procedural grounds.

B. After the issuance of "no refund condition" temporary certificates and the commencement of deliveries of gas thereunder, Public Service Electric and Gas Company, Long Island Lighting

Company, and United Gas Improvement Company, filed a joint motion to impose refund conditions on these temporary certificates issued to Respondents."[11]

On February 5, 1963, without ambiguity or equivocation, the Commission affirmatively rejected the distributors' request. In the pertinent order, set out as Appendix A hereto, the Commission held:

> "Petitioner's proposal in other words comes down to little more than an argument that we should unilaterally impose a new refund commitment upon the producers. *This we will not do.* Assuming without deciding that we have authority to impose such additional restriction where extraordinary conditions exist that would justify such action, we think this clearly would not be a proper action for us to take here. Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced the producers *to dedicate their gas to market upon one set of conditions, and then imposing more stringent conditions upon them.* Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with 'such certainty as to allow the exercise of choice upon [the producers'] part.' *Sunray Mid-Continent Oil Company v. F.P.C.*, 270 F. 2d 404. *Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy*" (29 FPC at 225) (emphasis added).

Significantly, the Commission, while describing the nature of the temporary certificates before it, stated that "*The initial price*

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[11] Particular sales to Transcontinental Gas Pipe Line Corporation were covered by this motion, including the certificate dockets listed in Note 5, *supra.*

would, however, continue to be collected until a prospective price could be determined after hearing . . ." (29 FPC at 224) (emphasis added).[12]

In a radical departure from the unequivocal order of February 5, 1963, the Commission in Opinion No. 436, less than two years later, issued to Respondents permanent certificates providing for the future exercise of an asserted power to impose refund liabilities for gas sold during the time that the "no refund condition" temporary certificates were in effect.[13] Thus, by Ordering Paragraph (C) of Opinion 436 (J. A. 378), the Commission *temporarily deferred doing exactly what it had firmly said it would not do at all in its Order of February 5, 1963.*

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[12] The [redacted] in the consolidated proceedings below were thus reassured that refunds would not be exacted; however, this was not the sole occasion on which reassurances were provided the industry. For example, Joseph C. Swidler, while Chairman of the Commission, stated in an address given to the American Petroleum Institute on November 15, 1961, that temporary certificates without refund condition were intended to "authorize initial sales on a firm basis" so that "producers may know that all of the new initial price is theirs to keep . . ." Objectively, the foregoing statement and like reassurances must each be characterized as the direct opposite of a "forewarning" to producers that refunds would be exacted from them. Not surprisingly, the court below used the terms "unconscionable" and "hidden liability" in speaking of the plight foisted upon the "unwary producer," see Note 19, *infra.*

[13] Order No. 436 was also a radical departure in this respect from the earlier statement of the Commission General Counsel, who as late as July, 1963, on behalf of the Commission, assured the Court of Appeals for the District of Columbia Circuit that producers accepting temporary certificates without refund condition "would have had no reason to assume they might later be required to make refunds for the period that the temporary authorizations were in effect." Brief for Respondent Federal Power Commission, *Public Service Commission of the State of New York v. Federal Power Commission*, CADC Cause No. 17582, p. 29.

It is clear that the Commission's Order of February 5, 1963, was reviewable under Sections 19(a) and 19(b) of the Natural Gas Act, but the distributor-movants took no further steps to protect their asserted rights. Refer in this connection to *Cities Service Gas Company v. Federal Power Commission*, 255 F. 2d 860 (CA 10, 1958), *cert. den.*, 358 U.S. 837, in which it was held that:

> "An order of an administrative body is reviewable when action taken in advance of hearings or adjudication result in the setting of legal consequences, *Columbia Broadcasting System v. United States*, 316 U.S. 407, 62 S. Ct. 1194, 86 L.Ed. 1563. The order of the agency is final for purposes of review when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process, *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 211 F. 2d 51, *certiorari denied Japan-Atlantic and Gulf Conference v. United States*, 347 U.S. 990, 74 S. Ct. 852, 98 L.Ed. 1124 and cases cited therein" (255 F. 2d at 863).

The Commission's Order of February 5, 1963, had obvious "legal consequences," as well as an "impact upon rights"[14] claimed by the distributor-movants and also an "impact upon rights" asserted by Respondents. It plainly fixed a "legal relationship" within the contemplation of the cited authorities and operated, as well, to deny "rights" sought by the distributors. The Commission's Order of February 5, 1963, in short, was no mere "abstract declaration,"[15] but was an order entered on motion filed by the

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[14] In *Amerada Petroleum Corporation v. Federal Power Commission*, 285 F. 2d 737 (CA 10, 1960), it was stated that "To be reviewable, an order must have an impact upon rights . . ." (285 F. 2d at 739).

[15] *Cf., Pennsylvania Railroad Company v. United States*, 363 U.S. 202, 205 (1960).

distributor-movants and answers filed by Respondents. The Commission's order on the one hand absolutely rejected the distributors' request, and on the other hand, firmly and unequivocally ruled that Respondents had no refund liability for gas sold in reliance upon earlier orders granting temporary certificates.

In *Pan American Petroleum Corporation v. Federal Power Commission*, 322 F. 2d 999 (CADC, 1963), the Court, in discussing the period in which an agency may revise its own order, stated:

> "This Court has consistently held that an administrative agency retains jurisdiction to reconsider and correct its order until the time for judicial review has expired. *Enterprise Company v. Federal Communications Comm.*, 231 F. 2d 768 (1955), *cert. den.*, sub nom., *Beaumont Broadcasting Corp. v. Enterprise Company*, 351 U.S. 920 (1956)" (322 F. 2d at 1004).

The above holding is authority for the correlative principle that an agency is without power to change the substance of its own order after that order becomes final by reason of absence of appeal.[16]

Notwithstanding, however, the definitive language of the Order of February 5, 1963, the distributor-movants failed to appeal, and the time for seeking review under Sections 19(a)

[16] Compare *Texaco Inc. v. Federal Power Commission*, cited *supra*. The court there held that the failure of the petitioners to appeal F.P.C. orders granting temporary certificates burdened with indefinite refund conditions deprived the court of power to determine the lawfulness of those conditions (290 F. 2d at 157). In the instant case, the Commission declined to impose any refund conditions by its Order of February 5, 1963, and distributor-movants acquiesced in that determination by failing to appeal.

and 19(b) of the Natural Gas Act expired several times over. During the review period, the Commission was not impelled to recall or to revise its Order of February 5, 1963; in fact, it took steps to change its view in the administrative proceedings below only when Opinion No. 436 — the agency opinion below — was issued. As a consequence of inaction during the time for appeal, the Order of February 5, 1963, is final and is binding and may not now be impugned or attacked by any party or litigant, including the agency itself.

The final and binding nature of the Order of February 5, 1963, directly points to the correctness of the decision below.[11] Moreover, the related course of conduct, involving agency assurances, significantly repeated and strikingly illustrated by an unequivocal order of the Commission that retroactive refunds would not be exacted, furnishes supporting grounds, not without ethical import, for the denial of the Petitions filed herein.

C. The Commission would depict the issue as bearing upon its power to condition *permanent* certificates (FPC Pet., No. 60, pp. 10-11), but this argument is simply an effort to disguise the actual meaning and effect of what the Commission proposes to do, *i.e.*, to amend and condition final *temporary* certificates, retroactively. Fundamentally, then, this argument of the Commis-

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[11] It is submitted that the doctrine of finality here urged incontestably resolves the refund issue as to Respondents' sales mentioned in Note 5, *supra*, *i.e.*, this doctrine supplies an additional, compelling reason why, in all events, the Petitions should be denied as to sales concluded by the Order of February 5, 1963.

sion falls because it divests *temporary* certificates of the dignity and meaning which they, as final orders, unquestionably possess. See *Federal Power Commission v. Hunt*, 376 U.S. 515 (1964), the *Hunt* case. If the Commission may, on permanent certification, retroactively modify the precedent temporary certificate or any of the conditions set out therein, it is obvious that the issuance of a temporary certificate involves mere ceremony, devoid of real, substantive meaning. Petitioners, under their view, would grant the Commission power to make a "no refund condition" temporary certificate more onerous than a temporary certificate with a specific refund condition.[11] Petitioners, under their view, would afford the Commission latitude to withdraw, change or modify the very conditions which, several years earlier, induced the dedication of gas to commerce. Without seeking to employ histronics, so to entrap a regulated natural gas company in this fashion is nothing short of shocking."[12]

The decision in *Hunt*, supra, makes clear that the Commission has authority, and in act is obligated, to protect consumers

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[11] This anomoly exists because of Petitioners' claim that "no refund condition" temporaries permit the Commission to order "floorless" refunds, *ie.*, down to whatever level may finally be found for the "in-line" price; contrariwise, of course, under a temporary bearing an express refund condition, Petitioners are bound to recognize that refunds may be ordered only in accordance with the exact refund condition contained therein, down to the price level stated — the refund "floor" in the condition — and no lower.

[12] The court below observed (FPC Pet., App. A, p. 27): "And whatever the method by which temporary authorizations are handled, we consider it unconscionable to impose upon an unwary producer a hidden liability which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce."

during the pendency of temporary certificates by appropriate action taken at the time the temporary certificates are issued. In *Hunt*, the court spoke of the broad authority residing in the Commission relative to the issuance of temporary certificates under Section 7(e) of the Natural Gas Act; the court also stressed the importance and necessity of such authority being properly exercised. The court stated as follows:

> "... The Commission must have the authority to condition a temporary certificate so as to avoid *irreparable* injury to affected parties. *This condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate. In view of the ex parte nature of the proceeding, it appears only fair to all concerned that the condition upon which the rate was temporarily certified be continued unchanged until the permanent certificate is issued.*" (376 U.S. at p. 523) (emphasis added).

The Court in *Hunt, supra,* thus rebuts Petitioners' argument and shows that the exercise of administrative discretion and expertise in conditioning or in not conditioning temporary certificates *does* have significance. Otherwise, the Commission plainly does not need authority to condition a temporary certificate; otherwise, there can be no concern with *irreparable* injury. Indeed, if the Commission, at the later date of permanent certification, can retroactively modify valid temporary certificates, then such plenary authority renders the temporary certificates devoid of the meaning ascribed them in *Hunt*. Simply stated, Petitioners' argument falls of its own weight, for it cannot be reconciled with *Hunt*.

The holding of this Court in *Hunt, supra,* leads but to the reasoned conclusion that the decision below was correct. Indeed,

this Court's own earlier holding in *Hunt*, without more, compels the denial of the Petitions filed herein.

D. Contrary to the Commission's view (FPC Pet., No. 60, pp. 11-12), the decision below is fully consistent with this Court's holding in *United Gas Improvement Co., et al. v. Callery Properties, Inc.*, 382 U.S. 223 (1965), the *Callery* case. In *Callery*, this Court held that the Commission could order refunds of sums collected during the judicial review of permanent certificates which were ultimately set aside; the crucial point of *Callery* was that the Commission could require refunds under certificates "which never became final" (382 U.S. at 299). Through judicial review of their permanent certificates, the producers in Callery were clearly on notice of possible modification of their non-final certificates.[20]

In the present case, as indicated *supra*, the "no refund condition" temporary certificate orders of Respondents became fixed and final. The Producers had no notice of possible modification of the initial temporary certificate orders. Rather, they were later reassured by the February 5, 1963, order of the Commission that there would *not* be any modification of their temporary certificates to provide for refunds; the Order of February 5, 1963,— an additional order affirmatively stating this for all to read— then itself became final.

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[20] Moreover, the Court in *Callery* indicated that the producers were explicitly told by the Commission that refunds would be required under their non-final certificates (382 U.S. at 226).

In sum, the matter of legal finality[21] removes this case from the *Callery* rule pertaining to permanent certificates subject to modification on appeal. Thus, the holding of this Court in *Callery* represents no challenge to the correctness of the decision below. Indeed, far from challenging the decision below, *Callery* actually reaffirms the principle that the Commission cannot make reparation orders[22] and, thus, supports the holding below. The Petitions filed herein, then, should in all things be denied.

2. *The Issue Presented is Not of Sufficient Importance to Warrant Intervention by this Court.*

Petitioners state that the ruling below presents an important question in the administration of the Natural Gas Act. In support, Petitioners indicate that there are many other temporary certificates in regard to which the point here at issue may arise.

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[21] The finality of temporary certificates cannot be discredited by Petitioners, as they would seek to do, on the basis of *ex parte* issuance. Temporary certificates, although issued *ex parte*, are of public record and available for inspection in the Commission's public reference room. Indeed, the Commission's own regulations so require; see 18 C.F.R. 1.36(c)(6). In practice, the issuance of temporary certificate orders is carefully noted by distributor and consumer interests and they undertake to intervene with assiduous regularity; not infrequently, the intervenors choose to apply for rehearing of these orders under Section 19(a) of the Natural Gas Act and then, in some instances, to appeal them to court under Section 19(b) of the Act. In this connection, it should be observed that particular intervenors had notice of, and in fact appealed, temporary certificate orders involved in this very case; refer to the decision cited in Note 2, *supra*.

[22] 382 U.S. at 229. Reparations are exactly what Petitioners are seeking: refunds under lawful orders which even today are inviolate and unimpeached. See *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951); and *T.I.M.E. v. United States*, 359 U.S. 464, 469-470 (1959).

The potential refund liability, however, cannot be estimated by Petitioners, but Petitioners assert that "it is undoubtedly large."

From the numerical standpoint, it is understood that the Commission intended to cite, as an estimate, but 479 existing temporary certificates "in which the identical issue may arise" (FPC Pet., No. 60, p. 8). In all events, the hypothetical question posed in the Petitions has greatly declined in importance, for it is our understanding that the vast majority of those 479 temporary certificates prescribe prices at or below the current "in-line" price which the Commission, in completed proceedings, has already prescribed for the areas in question (and hence would not result in refunds), or are temporary certificates prescribing guideline prices in the very few areas in which the Commission has not yet prescribed "in-line" prices.

Additionally, we are advised that the Commission's work-papers indicate that, since the middle of 1964, the Commission has followed the policy of inserting *express* refund conditions in temporary certificates authorizing sales at prices higher than those prescribed in previously determined "in-line" certificate proceedings.

Moreover, in all events, it is clear that the Commission has unquestionably eliminated the ruling below with respect to all new temporary certificates, since it now requires the inclusion of *express* refund conditions pursuant to Commission general

order.[23] The issue before the Court, then, will not arise in temporary certificates hereafter issued.

It can thus hardly be disputed that the "retroactive refund" issue relates to a finite, limited number of temporary certificates[24] for a limited period of refund liability.[25] Surely, the issue does not assume the stature of a recurring problem broadly posing obstacles to the administration of the Act, for, indeed, the entire "in-line" concept is but an interim procedure pending the establishment of area rate levels by the Commission. Certainly, at most, the issue relates only to a limited number of sales awaiting permanent certification, and, as to those sales, only the locked-in period preceding permanent certification is affected by the resolution of the subject issue. The issue is not present for deliveries of gas made after the date of permanent certification, for each temporary certificate at that time is replaced by a permanent certificate to govern sales prospectively. See *Hunt, supra.*

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[23] Order No. 336, Docket No. R-316, issued February 9, 1967. This order is set out in full as Appendix B to "Brief of Respondent Standard Oil Company of Texas in Opposition," Case No. 80, October Term, 1967.

[24] Sales concluded by the Order of February 5, 1963 (see Note 5 *supra*) are, of course, much fewer in number than the total temporary certificates issued without refund condition. Even when considered in connection with sales similarly affected by a like order of the same date in *Sunray DX Oil Co., supra,* Case No. 60, October Term, 1967, such sales are so numerically limited that the broad, general issue put by Petitioners cannot exist in the context of sales tested by these orders.

[25] In the instant case, the potential refund period runs from the date of initial deliveries (when the producer's choice became irrevocable by virtue of dedication to market), to July 23, 1964, when permanent certificates were issued. Prospectively, the "in-line" prices derived for Respondents' dockets relate to the period running from such date of permanent certification to the date of establishment of area rate levels.

The Commission's reference to potential refund liability under outstanding temporary certificates is speculative and inexact.[26] In this connection, the Commission is yet to be finally upheld in ordering specific refunds of amounts collected under unconditioned temporary certificates. Therefore, even assuming *arguendo* the existence of power in the Commission to order retroactive refunds, generally, there can be no meaningful measure of the amounts involved, because definitive guidelines or standards respecting the *exercise* of that power have not evolved.

Particularly in view of the limited number of temporary certificates affected, the fact that only a locked-in period preceding permanent certification is involved, and the unquestioned elimination of the issue in the future, it is clear that the question posed by Petitioners is not of sufficient importance to warrant intervention and consideration by this Court. Nor does potential refund liability under other temporary certificates enhance the importance of Petitioners' question, which, as indicated, cannot be meaningfully measured in terms of the amounts involved.

The Petitions, in sum, fail to exhibit an issue of importance which compels or requires resolution, and this Court, perforce, should deny the Petitions for that independent reason.

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[26] In any case, the refund situation involving dockets affected by the Order of February 5, 1963, must be distinguished from other cases involving temporary certificates issued by the Commission without refund condition. In the instance of the former sales, the Commission did not simply fail to impose specific refund conditions (FPC Pet., No. 60, pp. 8-9). Rather, the Commission affirmatively declared in unequivocal language that refunds would not be ordered. Thus, the broad, general issue stated by Petitioners is not present in the case of sales concluded by the Order of February 5, 1963.

CONCLUSION

The Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

J. P. HAMMOND
HAROLD H. YOUNG, JR.
P. O. Box 591
Tulsa, Oklahoma 74102

W. P. HARDEMAN
P. O. Box 50879
New Orleans, Louisiana
70150

WILLIAM J. GROVE
CARROLL L. GILLIAM
PHILLIP R. EHRENKRANZ
600 Madison Building
115 Fifteenth Street, N. W.
Washington, D.C. 20005
Attorneys for Pan American Petroleum Corporation

CECIL N. COOK
NEAL POWERS, JR.
1101 Esperson Building
Houston, Texas 77002
Attorneys for E. Cockrell, Jr., Freeport Sulphur Company and U.S. Oil of Louisiana, Inc.

W. P. BARNES
JERE G. HAYES
Meadows Building
Dallas, Texas 75206

CECIL E. MUNN
H. CARTER BURDETTE
1800 First National Building
Fort Worth, Texas 76102
Attorneys for General American Oil Company of Texas

August 4, 1967